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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/526,441	03/16/2000	Kamran Ahmed	10442-4"US" JA/mb JA/mb	2595
20988	7590	12/17/2003	EXAMINER	
OGILVY RENAULT 1981 MCGILL COLLEGE AVENUE SUITE 1600 MONTREAL, QC H3A2Y3 CANADA			BRIER, JEFFERY A	
		ART UNIT	PAPER NUMBER	
		2672	28	
DATE MAILED: 12/17/2003				

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Advisory Action</b>	Application No.	Applicant(s)
	09/526,441	AHMED, KAMRAN
Examiner	Art Unit	
Jeffery A. Brier	2672	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 08 December 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

a)  The period for reply expires 3 months from the mailing date of the final rejection.  
 b)  The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.  
 ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1.  A Notice of Appeal was filed on \_\_\_\_\_. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.  
 2.  The proposed amendment(s) will not be entered because:  
 (a)  they raise new issues that would require further consideration and/or search (see NOTE below);  
 (b)  they raise the issue of new matter (see Note below);  
 (c)  they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
 (d)  they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_.

3.  Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
 4.  Newly proposed or amended claim(s) \_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
 5.  The a) affidavit, b) exhibit, or c) request for reconsideration has been considered but does NOT place the application in condition for allowance because: \_\_\_\_\_.  
 6.  The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.  
 7.  For purposes of Appeal, the proposed amendment(s) a) will not be entered or b) will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_.

Claim(s) objected to: \_\_\_\_\_.

Claim(s) rejected: 1-33.

Claim(s) withdrawn from consideration: \_\_\_\_\_.

8.  The proposed drawing correction filed on 08 December 2003 is a) approved or b) disapproved by the Examiner.

9.  Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_.

10.  Other: \_\_\_\_\_.

Jeffery A. Brier  
 Primary Examiner  
 Art Unit: 2672

***Response to Amendment***

1. The amendment filed on 12/08/03 will be entered upon filing an appeal. This amendment corrects the paragraph at page 11 line 12. The 10/28/02 amendment amended page 10 line 24 to make reference to figure 5. On page 2 applicant makes reference to a set of drawings however, only one drawing was submitted on page 012/027 of the fax. Clarification is requested.
2. The proposed sheet of drawings, filed on 12/08/03 has been approved. A proper drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The correction to the drawings will not be held in abeyance.
3. The declaration filed on 12/08/03 under 37 CFR 1.131 has been considered but is ineffective to overcome the Boger reference.
4. The Boger reference is a U.S. patent or U.S. patent application publication of a pending or patented application that claims the rejected invention. An affidavit or declaration is inappropriate under 37 CFR 1.131(a) when the reference is claiming the same patentable invention, see MPEP § 2306. If the reference and this application are not commonly owned, the reference can only be overcome by establishing priority of invention through interference proceedings. See MPEP Chapter 2300 for information on initiating interference proceedings. If the reference and this application are commonly owned, the patent may be disqualified as prior art by an affidavit or declaration under 37 CFR 1.130. See MPEP § 718.

MPEP 715 and 715.05 states.

715 [R-1] Swearing Back of Reference — Affidavit or Declaration Under 37 CFR 1.131

(B) Where the reference U.S. patent or U.S. patent application publication claims the same patentable invention. See MPEP § 715.05 for a discussion of “same patentable invention” and MPEP § 2306. Where the reference patent and the application or patent under reexamination are commonly owned, and the inventions defined by the claims in the application or patent under reexamination and by the claims in the patent are not identical but are not patentably distinct, a terminal disclaimer and an affidavit or declaration under 37 CFR 1.130 may be used to overcome a rejection under 35 U.S.C. 103. See MPEP § 718.

**715.05 U.S. Patent or Application Publication Claiming Same Invention**

A 37 CFR 1.131 affidavit is ineffective to overcome a United States patent or patent application publication, not only where there is a verbatim correspondence between claims of the application and of the patent, but also where there is no patentable distinction between the respective claims. *In re Clark*, 457 F.2d 1004, 173 USPQ 359 (CCPA 1972); *In re Hidy*, 303 F.2d 954, 133 USPQ 650 (CCPA 1962); *In re Teague*, 254 F.2d 145, 117 USPQ 284 (CCPA 1958); *In re Ward*, 236 F.2d 428, 111 USPQ 101 (CCPA 1956); *In re Wagenhorst*, 62 F.2d 831, 16 USPQ 126 (CCPA 1933).

If the application (or patent under reexamination) and the domestic reference contain claims which are identical, or which are not patentably distinct, then the application and patent are claiming the “same patentable invention,” defined by 37 CFR 1.601(n) as follows:

Invention “A” is the same patentable invention as an invention “B” when invention “A” is the same as (35 U.S.C. 102) or is obvious (35 U.S.C. 103) in view of invention “B” assuming invention “B” is prior art with respect to invention “A.”

5. The declaration was made by a person not qualified under 37 CFR 1.42, 1.43, or 1.47 to make the declaration. Lorne Trotter is not one of the inventors and a showing why he must in lieu of the inventors make the declaration has not been provided.

MPEP 715.04 states.

Art Unit: 2672

**715.04 Who May Make Affidavit or Declaration; Formal Requirements of Affidavits and Declarations**

**WHO MAY MAKE AFFIDAVIT OR DECLARATION**

The following parties may make an affidavit or declaration under 37 CFR 1.131:

- (A) All the inventors of the subject matter claimed.
- (B) An affidavit or declaration by less than all named inventors of an application is accepted where it is shown that less than all named inventors of an application invented the subject matter of the claim or claims under rejection. For example, one of two joint inventors is accepted where it is shown that one of the joint inventors is the sole inventor of the claim or claims under rejection.
- (C) A party qualified under 37 CFR 1.42, 1.43, or 1.47 in situation where some or all of the inventors are not available or not capable of joining in the filing of the application.
- (D) The assignee or other party in interest when it is not possible to produce the affidavit or declaration of the inventor. *Ex parte Foster*, 1903 C.D. 213, 105 O.G. 261 (Comm'r Pat. 1903).

Affidavits or declarations to overcome a rejection of a claim or claims must be made by the inventor or inventors of the subject matter of the rejected claim(s), a party qualified under 37 CFR 1.42, 1.43, or 1.47, or the assignee or other party in interest when it is not possible to produce the affidavit or declaration of the inventor(s). Thus, where all of the named inventors of a pending application are not inventors of every claim of the application, any affidavit under 37 CFR 1.131 could be signed by only the inventor(s) of the subject matter of the rejected claims. Further, where it is shown that a joint inventor is deceased, refuses to sign, or is otherwise unavailable, the signatures of the remaining joint inventors are sufficient. However, the affidavit or declaration, even though signed by fewer than all the joint inventors, must show completion of the invention by all of the joint inventors of the subject matter of the claim(s) under rejection. *In re Carlson*, 79 F.2d 900, 27 USPQ 400 (CCPA 1935).

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeffery A. Brier whose telephone number is (703) 305-4723. The examiner can normally be reached on M-F from 6:30 to 3:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Razavi, can be reached at (703) 305-4713.

**Any response to this action should be mailed to:**

Commissioner of Patents and Trademarks

Washington, D.C. 20231

**or faxed to:**

**(703) 872-9306 (for Technology Center 2600 only)**

Hand-delivered responses should be brought to Crystal Park II, 2121 Crystal Drive, Arlington, VA, Sixth Floor (Receptionist).

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Technology Center 2600 Customer Service Office whose telephone number is (703) 306-0377.



Jeffery A Brier  
Primary Examiner  
Art Unit 2672